SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 808

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

v.

AARON ALEXANDER,
Respondent,

v.

BETHLEHEM STEEL CORPORATION,
Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Statement of the Case

Respondent Alexander accepts the statement of facts set forth in Pages 2 through 5 of the Petition, with the following exceptions:

The unseaworthiness of the S. S. ELBA was *not instantaneous* or *momentary*. It was caused at some time before the gang of longshoremen with whom Alexander was work-

ing had entered this hold of the ship. The dunnage was left in a dangerous condition, at least prior to the dinner break, because the very first load that was lowered by the crane into this particular hold struck the overhanging dunnage and caused it to strike Alexander, causing serious injuries to him. Who left it in this unsafe position or how long it so remained is uncertain, but that it did remain in this dangerous, improper manner, protruding over an opening between the steel beams already stowed for a *considerable length of time* was undisputed. Not only did the longshoremen working with Alexander so testify, but this was corroborated by the petitioner's own witness and foreman, Richard T. Shanahan, and by Melford J. McDonald, assistant district agent, Bethlehem Steel, Marine Division, in his testimony on behalf of that party.

Furthermore, there was a plethora of evidence of the incompetence of the crane operator Fowler, his inexperience, the fact that he had failed to follow signals earlier that evening in another hold hitting the sides of the ships with loads of steel and causing the longshoremen to run for cover, and dropping loads of steel and causing dunnage to fly ten to twelve feet in the air. Complaints had been made about his incompetency to the petitioner's lead man, but he, the crane operator, was not removed. Consequently, petitioner is incorrect in stating "that the vessel was being loaded in accordance with the usual, customary and safe method."

There was also proof of the inadequacy of the lighting in this hold of the ship, and that the lights were improperly located, causing shadows by the incoming loads of steel which might very well have caused Huff to overlook this protruding or overhanging dunnage and fail to remove it. Huff was working in semi-darkness.

None of the above was instantaneous or momentary.

The Issues and Holdings Below

In the District Court where this action was tried the jury found the S.S. ELBA unseaworthy, that Alexander was not contributorily negligent, and awarded a verdict to him against Bethlehem. The jury also decided that Bethlehem was entitled to recover over against the present petitioner under its *contract of indemnity.* The Court of Appeals affirmed the judgment of the District Court based upon this verdict.

The petitioner raises no new or novel issue of law pertinent to the facts relative to the issue of liability. If there is any need for consideration of instantaneous negligence by this Court, surely this present case is not the one to bring before this Court, because no momentary act causing unseaworthiness is involved.

ARGUMENT

QUESTION I

There is no novel or new question or conflict among decisions that requires consideration by this Court based upon the facts as to unseaworthiness of the ship in question.

Petitioner is attempting to strain the facts to infer that the unseaworthiness of the ship was based upon instantaneous or momentary negligence. On Page 11 petitioner states "It is a case of simple dereliction in the manner of doing the job—failure to remove a piece of dunnage." It is not the failure of Huff to remove the dangerously placed dunnage, but rather the *original placing of this dunnage in an unsafe and dangerous position* that made the ship unseaworthy.

Even if the ship were made unseaworthy momentarily or instantaneously so as to cause Alexander's injuries then, under the decision in Mascuilli v. United States, 387 U. S. 237, 87 S. Ct. 1705, 18 L. Ed. 2d 743 (1967) the judgment in the present case should be affirmed and this petition denied.

However, since the ship was rendered unseaworthy at a time substantially prior to the time Alexander was injured, and not at the "moment of injury", there is considerable precedent for denying this petition for a writ of certiorari.

> "This case also presents the question of whether the defect 'should be considered as an incident in a continuous course of operation' and not as an unfitness of the ship. Grillea v. United States, 232 F. 2d 919, 922 (2nd Cir. 1956). In defining unseaworthiness we are not concerned with the conduct or process by which fitness is changed to unfitness. Our focus is upon the resulting condition of the ship. See Puddu v. Royal Netherlands Steamship Company, 303 F. 2d 752 (2nd Cir.) cert. denied 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962) (Hays, J., concurring).
>
> Here, the longshoremen, by improperly using an open mouth hook, fashioned an apparatus which was patently unsuitable for the job to which it was put. The use of this apparatus took a substantial amount of time, so that the apparatus became a part of the *Madaket's* equipment. See Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 941 (1962).
>
> Recently, in Reid v. Quebec Paper Sales & Transportation Company, 340 F. 2d 34, 35 (2d Cir. 1965) where a portable ladder was left unsecured, we said:
>
> 'Under the circumstances it was necessary for the ladder to be secured in some fashion when it was being used, and unless it was so secured, it was unfit for its intended use. An unsecured and dangling ladder under the conditions existing at the time of the accident posed a serious threat to the safety of those standing below in the hold, regardless of whether the

ship owner knew it was unsecured and *regardless of how quickly this threat materialized.'* See Strika v. Netherlands Ministry of Traffic, *supra;* Grillea v. United States, *supra.*

Massa v. C. A. Venezuelan Navigacon, 332 F. 2nd 779 (2d Cir. 1964); Spinelli v. Isthmian S. S. Co., 326 F. 2d (2d Cir.) cert. denied 377 U. S. 935, 84 S. Ct. 1338, 12 L. Ed. 2d 298 (1964) and Puddu v. Royal Netherlands S. S. Co., 303 F. 2d 752 (2d Cir.) cert. denied 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962) are all distinguishable since they were thought to involve transitory situations which had not yet ripened into unseaworthiness. Each arose 'as a *momentary step or phrase in the progress of work* on board' and was 'considered as an incident in a continuous course of operation.' Grillea v. United States, *supra,* 232 F. 2d at 922". (Emphasis ours.)

Skibinski v. Waterman Steamship Corporation v. I. T. O., 360 F. 2d 539 (2d Cir. 1966).

"The claim is based upon the theory that, as soon as the wrong hatch cover was placed over the 'pad-eye' the ship became *pro tanto* unseaworthy, and that, when the libellant stepped upon it and it gave way beneath him, he came within the decision of the Supreme Court in Seas Shipping Company v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, which extended the doctrine of The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760, 'to *longshoremen,* while loading or discharging a ship'. – – – On the other hand, if the wrong hatch cover had been placed over the 'pad-eye' the day before the libellant stepped on it, this ship would have been unseaworthy; for that was in effect just what we decided in Mollica v. Compania Sud Americana, 2 Cir., 202 F. 2d 25."

Grillea v. United States, 232 F. 2d 919, 922 (2nd Cir. 1956).

"It (liability) does attach if the negligent act has terminated and an appliance has been left in an unsafe condition – – –. There negligence consisted in

> failing to act prior to the accident – – –. There negligence had come to rest before the ladder fell and was thus an antecedent condition causing the ladder to become unseaworthy."
>
> Beeler v. Alaska Aggregate Corporation, 336 F. 2nd 108 (9th Cir. 1964).

As long as an act making the ship unseaworthy was not instantaneous it matters not if a longshoreman is injured because of the failure of stevedores who had stored the cargo at the shipping point and omitted proper wedges and dunnage or, as in our case, a prior crew or gang improperly stowed cargo. Ryan Co. v. Pan-Atlantic Corp., 350 U. S. 124.

Again we reiterate that nowhere in the *evidence is there any testimony that the damage was improper but only that it was laid improperly before Alexander and his gang even entered Number 3 hold. The Trial Court specifically charged that, if the jury finds it was improperly placed, to charge any further would be irrelevant, unnecessary, surplusage, and could only tend to confuse the jury.*

The cases cited by petitioner allegedly evidencing a conflict of decisions in different circuits of the Court of Appeals have no pertinency here. We are not concerned with unseaworthiness "as a momentary step or phase in the progress of work," "instantaneous unseaworthiness," or "negligent use of a seaworthy appliance at the *very moment* of injury." The petitioner is obviously confusing the improper *placing* of dunnage with the failure to *remove* the dunnage. The Trial Court referred to this "improper placing of dunnage" and not to Huff's failure to remove the dunnage at his northerly end of the gap. This had already crystallized into an unsafe and unseaworthy ship long before the resulting injury to Alexander. There appears to be no conflict of decisions among the various

circuits of the Court of Appeals that a ship is unseaworthy if "the negligent act has terminated and an appliance had been left in an unsafe condition" (Page 5 of petition). This is precisely the situation in the present case.

QUESTION II

This Court has repeatedly passed upon the relationship between claims by longshoremen caused by unseaworthiness of a ship and their rights under the Longshoremen's and Harbor Worker's Compensation Act, and this question has been consistently answered requiring no further consideration by this Court.

Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124 (1956), held that a shipowner who was forced to pay damages to a longshoreman injured by an unsafe storage of cargo could recover indemnity from the stevedoring employer for whom the longshoreman worked. At that time the Court foursquarely refuted arguments that the exclusivity provision in Sec. 5 of the Longshoremen's Act barred the owner's claim for indemnity from the stevedore. The Court was likewise unimpressed by the contention that the result in RYAN made the economic burden of the longshoreman's recovery fall on the stevedoring employer contrary to the purpose of the act.

Italia Societa v. Oregon Stevedoring Co., 376 U. S. 315 (1964), Crumady v. The Joachim Hendrick Fisser *et al.*, 358 U. S. 423 (1959) and numerous other cases made this conclusion very

> "Unseaworthiness is not excused on the ground that it was caused by the acts of fellow servants. See Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944); *cf.* Crumady v. The J. H.

Fisser, 358 U. S. 423, 427, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959)."

Skibinski v. Waterman Steamship Corporation v. I. T. O., 360 F. 2d 539 (2nd Cir. 1966);

Mascuilli v. United States, 387 U. S. 237, 87 S. Ct. 1705, 18 L. Ed. 2d 743 (1967);

Rogers v. United States, 347 U. S. 984 (1954);

Waldron v. Moore-McCormack Lines Inc., 386 U. S. 724, 87 S. Ct. 1410, 18 L. Ed. 2d 482 (1967).

The petitioner apparently overlooks the fact that the third-party judgment of Bethlehem Steel against this petitioner (Page 12 of petition) was not based upon operation of law, but rather upon the contract of indemnity. It is fundamental that one has a right to make claim against anyone not his employer causing one's injuries through negligence, unseaworthiness of a ship, etc. Alexander brought such a claim against Bethlehem Steel and the trial jury found in his favor upon the facts. This same jury decided that Bethlehem Steel was entitled to indemnification under the terms of the contract between that Company and petitioner. This contract was pleaded, proved and interpreted by the trial judge and jury. The judgment against petitioner resulted from this written contract of indemnity. If by this written contract petitioner gave up any protection that it had under any compensation law, it can hardly be heard to complain of the effects of this written contract *which was of its own doing.*

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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